

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF MINNESOTA

3 Civil Nos. 06-1216(JMR/FLN)

06-1691(JMR/FLN)

4 Hennepin County District Court File No. 27-CV-07-8085

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7 IN RE: UNITEDHEALTH GROUP INCORPORATED SHAREHOLDER
DERIVATIVE LITIGATION

8 IN RE: UNITEDHEALTH GROUP INCORPORATED PSLRA LITIGATION

9 UNITEDHEALTH GROUP Litigation, Hennepin County District
10 Court
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13 TRANSCRIPT OF PROCEEDINGS HAD BEFORE

14 UNITED STATES DISTRICT COURT **JUDGE JAMES M. ROSENBAUM**

15 HENNEPIN COUNTY DISTRICT COURT **JUDGE GEORGE McGUNNIGLE**

16 United States Courthouse

17 Minneapolis, Minnesota

18 December 12, 2008
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25 Reported By: Dawn M. H. Hansen, RMR-CRR

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1 P R O C E E D I N G S

2 (In open court; 9 o'clock a.m.)

3 THE CLERK: Your Honors, the matter on the
4 calendar is In Re UnitedHealth Group Incorporated
5 Shareholder Derivative Litigation, 06-1216. Minnesota No.
6 27-CV-07-8085. Will counsel please state their appearances
7 for the record?

8 MR. CAMBRONNE: Morning, Your Honors, Karl
9 Cambronne appearing on behalf of the federal derivative
10 plaintiffs.

11 JUDGE ROSENBAUM: Mr. Cambronne.

12 MR. JOHNSON: Good morning, Your Honors, Chad
13 Johnson at Bernstein Litowitz on behalf of six of the
14 institutional investors for lead plaintiffs in the federal
15 action.

16 JUDGE ROSENBAUM: Counsel.

17 MR. VANDER WEIDE: Morning, Your Honors, Vern
18 Vander Weide on behalf of the state derivative shareholder
19 plaintiffs.

20 JUDGE ROSENBAUM: Mr. Vander Weide.

21 MS. BERENS: Barbara Berens of Kelly and Berens on
22 behalf of the UnitedHealth Special Litigation Committee, and
23 I have with me both Justices Blatz and Stringer.

24 JUDGE ROSENBAUM: Counsel.

25 MR. CARTER: Good morning, Your Honors, Peter

1 Carter representing all defendants with the exception of Mr.
2 Spears, Mr. Lubben, and Dr. McGuire.

3 MR. LOEWENSON: Carl Loewenson, Jr., from Morrison
4 and Foerster, for defendant William Spears.

5 MR. LEVINE: Good morning. Seth Levine, Foley &
6 Lardner, for David Lubben. I'm joined by Rick Mark from
7 Briggs & Morgan.

8 JUDGE ROSENBAUM: Counsel.

9 MR. BRODSKY: Morning, Your Honors, David Brodsky
10 from Latham and Watkins representing Dr. McGuire.

11 MR. GASKINS: Good morning, Your Honors --

12 JUDGE ROSENBAUM: What, you layin' back today or
13 what?

14 JUDGE MCGUNNIGLE: Good morning, counsel,
15 including Mr. Gaskins.

16 JUDGE ROSENBAUM: The reluctant Mr. Gaskins. Good
17 morning. Mr. Hashmall I see hiding back there, and the rest
18 of the federal bar of the state of Minnesota. Counsel, you
19 may proceed.

20 MS. BERENS: May it please the Court. Umm, I am
21 going to be speaking on behalf of the UnitedHealth Group
22 Special Litigation Committee, and what I would like to cover
23 is first off the standard of review that I believe these
24 courts should both apply, and then get into the two specific
25 factors that the Minnesota Supreme Court set forth and the

1 reasons why my clients have amply satisfied the two prongs
2 of that test.

3 The Federal District Court certified a question to
4 the Minnesota Supreme Court. In this past summer the
5 Minnesota Supreme Court clearly adopted one of the two
6 contrary standards of review for an SLC's disposition of
7 shareholder derivative claims. And the policy reasons I
8 think for the Minnesota Supreme Court's decision are
9 instructive in terms of why the court turned left rather
10 than right, or I guess right rather than left.

11 The court, the Minnesota Supreme Court, examined
12 the two contrary standards that have grown up in the case
13 law, the state law case law, regarding the deference due a
14 special litigation committee when determining whether to
15 proceed, settle, or dismiss with prejudice shareholder
16 derivative claims. And the Minnesota Supreme Court first of
17 all looked at whose claims an SLC is taking a look at, and I
18 think it was critical to the court's analysis that the
19 claims that a special litigation committee is investigating,
20 ah, deliberating on and ultimately disposing of in one
21 fashion or another, are derivative claims. They are claims
22 that are owned by the corporation, and the Minnesota Supreme
23 Court felt in that instance where the claims are those of
24 the corporation. It is the corporation, or in instances
25 where the corporation's board are conflicted out, a duly

1 appointed special litigation committee should be the body
2 that determines in the first instance what happens to these
3 shareholder derivative claims.

4 The court examined whether or not a court after
5 the fact under Zapata should be exercising its own
6 independent business judgment to determine whether or not
7 the special litigation committee's disposition of claims
8 should be approved or not. And the Minnesota Supreme Court
9 focused on the fact that in its opinion the district
10 reviewing court, be it state or federal, was not qualified
11 to exercise its own independent business judgment, because
12 it is not in the position of a special litigation committee
13 where the committee can look at an amalgam, as this
14 committee did, of an extraordinary number of factors, facts,
15 and the law to reach a determination about what is in the
16 best interests of the corporation.

17 JUDGE ROSENBAUM: Are they looking out for the
18 corporation, and what obligations have they to the
19 shareholders?

20 MS. BERENS: Your Honor, I would argue that
21 ultimately the shareholders are an indirect benefit of
22 recovery.

23 JUDGE ROSENBAUM: I mean, the board, a board of
24 directors is typically the shareholders' representative in
25 the management of the company, then they select the

1 directors, and it goes on from there, they are officers.
2 What is the relationship between the directors, or I'm
3 sorry, the, ah, the SLC and the shareholders?

4 MS. BERENS: Well, Your Honor, I think the --

5 JUDGE ROSENBAUM: I mean, who are they looking out
6 for here?

7 MS. BERENS: I understand, Your Honor, thank you.
8 I believe that indirect beneficiaries of a settlement or
9 ultimately the prosecution or the dismissal of derivative
10 claims arguably inures to the benefit of the shareholders,
11 but I think it is just one component of what an SLC should
12 be examining, because, for example, if an SLC made a
13 determination, and I'm speaking in the abstract and not
14 about this particular association -- but if an SLC
15 determined that claims have merit, but which prosecuting
16 those claims ultimately the corporation might fail, for
17 whatever reason, umm, then the shareholders' interests would
18 be aligned with the corporation's interests, that --

19 JUDGE ROSENBAUM: I mean, on some level you'd like
20 to have them aligned, it seems to me.

21 MS. BERENS: Absolutely, Your Honor.

22 JUDGE ROSENBAUM: They do own it.

23 MS. BERENS: Pardon -- yes.

24 JUDGE ROSENBAUM: Sometimes people forget that,
25 but --

1 MS. BERENS: And I agree with that, Your Honor.
2 Obviously that's a function of corporate law. And I think
3 a, a properly constituted SLC doing its job of acting in
4 good faith and independently is examining all kinds of
5 factors, including the shareholders' best interests.

6 JUDGE ROSENBAUM: Okay.

7 MS. BERENS: So I think that is absolutely one of
8 the factors that an SLC should consider.

9 JUDGE MCGUNNIGLE: Including but not limited to?

10 MS. BERENS: Yes, Your Honor. I would say
11 including but not limited to.

12 JUDGE MCGUNNIGLE: What or who are the other
13 indirect beneficiaries, if it's including but not limited
14 to?

15 MS. BERENS: I think there's more direct
16 beneficiaries, Your Honor. And, for example, in this
17 particular instance where, umm, a settlement was reached,
18 the direct beneficiaries of that settlement was the
19 corporation, if and when this settlement is approved. Umm,
20 the amount of money that has been recovered from the three
21 individuals with whom settlements have been reached, that
22 money flows directly back to the corporation. So the
23 corporation's actually a direct beneficiary of that. In
24 addition, I think, ah, there are others that are probably
25 beneficiaries of that sort of dissolution, or disposition,

1 and that would be company employees. Umm, I think
2 beneficiaries would be, ah, also people with whom the
3 corporation does business. And I think these are all things
4 that an SLC doing its job takes into account when it is
5 making its determination about what's in the best interests
6 of the corporation.

7 I'm going back to the factors underlying the
8 Minnesota Supreme Court's decision. And the Minnesota
9 Supreme Court made clear that they did not want to undermine
10 the special litigation process, and they wanted to avoid the
11 type of extensive inquiry and probably lengthy inquiry that
12 would be necessitated by adoption of the Zapata standard.

13 With that policy justification, the Minnesota
14 Supreme Court held that the reviewing court is confined to a
15 procedural inquiry that focuses on two separate factors.
16 One, the independence of the special litigation committee
17 appointed, and two, whether its procedures were adequate,
18 whether they were conducted in good faith, and whether they
19 were appropriate. And this Special Litigation Committee is
20 I believe unique under both of these prongs. I'd like to
21 address independence first, if I may.

22 The two members of this SLC are former justices of
23 the Minnesota Supreme Court, amply qualified to make
24 determinations about both the factual and legal
25 underpinnings of the shareholder derivative claims asserted

1 in both of these actions. They are independent in the true
2 essence of the word. They both made the determination
3 before they agreed to be on the Special Litigation Committee
4 that they had no material personal, financial, business, or
5 other relationships with either the corporation or any of
6 the named defendants. I think this Special Litigation
7 Committee is rare in that instance, because neither of these
8 members had been on the board, they were not involved in any
9 fashion in the challenged conduct, they did not approve the
10 challenged conduct at issue here, and they also relied on
11 independent advisors and counsel in the context of their
12 investigation. So I would argue that clearly they meet the
13 standard of independence.

14 JUDGE ROSENBAUM: I will -- far be it from me to
15 speak for my brother, but I don't think either one of us
16 harbor huge doubts in this particular area.

17 JUDGE MCGUNNIGLE: Judge Rosenbaum speaks for me
18 in that regard.

19 MS. BERENS: Well, I won't dwell on that factor
20 any longer.

21 JUDGE ROSENBAUM: They are two estimable, fine
22 people, and they are well known to the Court, and that is
23 not one of the problems in this case.

24 JUDGE MCGUNNIGLE: Well known to both Courts, I
25 might add.

1 JUDGE ROSENBAUM: But not so well known since
2 they've been appointed because I can't talk to 'em anymore.

3 MS. BERENS: Well, on your side that's true. On
4 my side I spent a lot of time talking to 'em.

5 JUDGE ROSENBAUM: Well, I guess it's a
6 compensating balance. Okay.

7 MS. BERENS: The second factor focuses on the
8 procedures of the SLC process. And again I would argue that
9 this special litigation committee did extraordinary work in
10 this case. Both justices were personally involved,
11 extensively involved from the very beginning. A 15-month
12 investigation was conducted where the company was not
13 involved other than --

14 JUDGE ROSENBAUM: Barbara, what are we supposed to
15 do, at least what am I supposed to do with the fact that
16 they didn't tell me how they made their decision in any
17 fashion? I mean, basically what we have is a black box.
18 And when the Minnesota Supreme Court says that I'm to be
19 concerned about their procedures, all I was told is what
20 streets they walked on.

21 MS. BERENS: Well, I, I disagree in one sense,
22 Your Honor. I think what the special litigation report laid
23 out was a number of things that I think the Court can hang
24 its hat on, if you will. And I'll set aside the issue of
25 whether or not an SLC is required under the Minnesota

1 Supreme Court opinion to do anything more than this Special
2 Litigation Committee has done for purposes of its report.
3 But I think what the Special Litigation Committee did was,
4 first of all it made a determination because of the ongoing
5 PSLRA litigation, umm, that detailed findings of fact were
6 not appropriate. It also had the benefit of the Wilmer Hale
7 report which I think went into great detail about a lot of
8 the allegations that were underlying this particular
9 shareholder derivative litigation. But they, I think what
10 the SLC did was a lot more than that. They laid out the --

11 JUDGE ROSENBAUM: Let me back up to the first
12 one --

13 MS. BERENS: Sure.

14 JUDGE ROSENBAUM: -- because the first one, it
15 almost strikes me as a circular argument. It is quite
16 frequent that you will get a PSLRA and a collateral,
17 parallel, whatever you want to call it, shareholders
18 derivative. And if that says, if the answer to that is, and
19 if there's a PSLRA we don't have to tell you what we did,
20 then we're all done with the inquiry altogether.

21 MS. BERENS: Well, Your Honor, I think frequently
22 in a lot of cases, and particularly cases --

23 JUDGE ROSENBAUM: Then of course you can add in,
24 while we're at it, whether or not there's a Department of
25 Justice or, ah, umm, you know securities investigation at

1 the same time. Any time you say that, then all of a sudden
2 according to that argument I have to salute the flag.

3 MS. BERENS: Well, Your Honor, I think in a lot of
4 cases --

5 JUDGE ROSENBAUM: Which may be the rule, I'm not
6 sure. But that's the issue.

7 MS. BERENS: That is indeed the issue.

8 JUDGE ROSENBAUM: Well, at least I hit it, okay.

9 MS. BERENS: Of course. Well, I think in a lot of
10 cases, Your Honor, it is a little different in that both the
11 class action and the derivative claims are asserted in the
12 same action, so some of that is not true, but I understand
13 your point about the circular argument. And I think the
14 answer to that is twofold. I think clearly under a Zapata
15 standard, the Court is literally sitting as an additional
16 member of the SLC.

17 JUDGE ROSENBAUM: Um hmm.

18 MS. BERENS: And is obviously privy to anything
19 and everything that an SLC considered. Ah, I think in this
20 SLC report, however, the justices did lay out the framework
21 for the actions they took, and they set forth a number of
22 factors that were weighed in the process. And they did it,
23 a detailed description of the type of factors. And, for
24 example, they described the fact finding process that went
25 on, umm, in terms of the witnesses, the witnesses were

1 identified, the fifty witnesses that were interviewed
2 extensively by the SLC. They described that those witness
3 interviews were generally a day or more. They described the
4 types of questions that the witnesses were asked, and they
5 also noted in the report that witnesses were generally
6 forthcoming, primarily forthcoming in response to those
7 questions. They talked about the focus of their
8 investigation and what types of records were looked at.
9 What types of materials were obtained from third parties,
10 the types of advisors on which the SLC relied.

11 The SLC also laid out in great detail the legal
12 structure on which they judged the shareholder derivative
13 claims. So to the extent the Court wants to look at the
14 legal framework that they operated in, that's clearly set
15 forth. And, for example, umm, the Section 14 claims, the
16 SLC determined that the complaint failed to state a claim
17 because the plaintiffs failed to allege the appropriate
18 elements to state a claim.

19 So I think the detailed facts underlying
20 determinations were not laid forth. But, for example, with
21 some of the employee officer defendants, the SLC report said
22 these people weren't even involved in the stock option
23 process, so I think the Court can take comfort in the fact
24 that the SLC examined these people and found they didn't
25 even have personal involvement in the challenged practices.

1 With other defendants, for example some of the director
2 defendants, the SLC pointed out in the report that the stock
3 options that were given to directors were given on a routine
4 basis. Prescheduled, a certain number of, used to be once a
5 year, then it became quarterly, so again, there was, umm, an
6 indication that in its deliberative process the SLC carved
7 these people out because they were in a unique position.

8 With the three defendants with which all the
9 parties have reached settlement, the SLC reached the
10 conclusion that for remaining claims, carved out, for
11 example, the Section 14 claims, the claims had some merit.

12 And I think again, the Court can take comfort in
13 the fact that this wasn't a rubber stamped process. This
14 was a process where this SLC went in, without a preconceived
15 bias as regards what the board did or did not do, or the
16 corporate officers did or did not do, and in a way that was
17 probably less explicit than in the Wilmer Hale report --

18 JUDGE ROSENBAUM: Charmingly put.

19 MS. BERENS: Thank you, Your Honor. But --

20 JUDGE MCGUNNIGLE: Are we to look at the
21 procedures, as you've been talking about them, in effect as
22 circumstantial evidence that the findings, whatever
23 findings, or whatever facts the SLC relied on were
24 sufficient to support their various decisions and
25 recommendations?

1 MS. BERENS: I wouldn't put it that way, Your
2 Honor, because I think that starts crossing over into
3 Zapata. I think the real difference, I don't believe under
4 the Minnesota Supreme Court's decision you get into
5 sufficiency unless I think from the face of the report. The
6 process seems so deficient that it may, for example, suggest
7 that the SLC was not acting in good faith. And I think
8 within those two prongs, I think there is indeed some room
9 to look at procedure and, as the court explicitly held,
10 adequacy of procedure. And I know during oral argument at
11 the Minnesota Supreme Court the question was asked of
12 Marianne Short, well, are you arguing that if an SLC reaches
13 a settlement of one dollar that the court can't challenge
14 that? And I think the answer in the opinion is that would
15 probably go toward both good faith and arguably adequacy of
16 the procedures, because --

17 JUDGE ROSENBAUM: What procedure would be lacking
18 in such a settlement?

19 MS. BERENS: Well, Your Honor, I think it could be
20 a couple of things. I think in the con -- in the context of
21 the mediation process, if the mediation resulted in a
22 settlement, there would be an argument that there weren't
23 arms' length negotiations, that there was some sort of
24 collusion between the parties. There might be an argument
25 that the SLC didn't spend sufficient time digging in to the

1 merits of the claims, so it -- and in this case uniquely
2 that the plaintiffs' counsel, the lead plaintiffs' counsel,
3 too, would be inclined to take a lesser amount or a minimal
4 amount. So I think it's a continuum, and I don't think it's
5 entirely black and white. But I do think in a case like
6 this where I think the procedures were clearly adequate, the
7 investigation was extraordinarily extensive, the Special
8 Litigation Committee was personally and actively involved,
9 and didn't rely on lawyers to do the interviews. I mean,
10 these two justices sat there and made their own independent
11 credibility determinations witness by witness by witness. I
12 think in a case like this, too, where the amount of the
13 settlement is substantial, and the mediation was attended by
14 virtually all the parties to the two independent shareholder
15 derivative actions, I think the Court can take assurance
16 that this was not some back room deal that was reached.

17 Settlement. We did reach settlements with three
18 of the individual defendants. We are here today to ask
19 that -- both courts to preliminarily approve it. There may
20 be some question, I think the courts are probably in
21 different positions for purposes of review, and I want to
22 address just briefly those differences.

23 I think for purposes of Judge McGunnigle, I think
24 the state Supreme Court has spoken, and they have also
25 rejected the notion that the Minnesota Rule 23 provides some

1 other substantive standard on which the Court should look
2 beside the two factors that the Supreme Court set forth.

3 I think for purposes of you, Judge Rosenbaum, I
4 think there may be also some questions about --

5 JUDGE ROSENBAUM: I think your argument there is,
6 while the Minnesota Supreme Court reminded me that they're
7 not in the business of interpreting the federal rules, but
8 you were nice enough in your brief to tell me that the
9 Supreme Court of the United States has, and this is
10 procedure and I'm supposed to look to state substantive, at
11 least according to your argument.

12 MS. BERENS: That's correct, Your Honor.

13 JUDGE ROSENBAUM: Okay, well, at least I read it.

14 MS. BERENS: And I appreciate that.

15 JUDGE ROSENBAUM: Well, I do the best I can. All
16 right.

17 MS. BERENS: In light of that I would --

18 JUDGE ROSENBAUM: Can you tell us, because I do
19 not, I'm not, it is not clear to me, were the sums set at
20 the settlement, the settlement sums? Or were the sums based
21 on values of shares which will be transferred at later
22 times?

23 MS. BERENS: Ah --

24 JUDGE ROSENBAUM: Because quite obviously, we are
25 dealing with a -- you could hardly look in the newspaper

1 without seeing somebody ballyhooing how big the numbers
2 were, and I just, are we still talking about the same things
3 here?

4 JUDGE MCGUNNIGLE: And as I read the papers that I
5 read, it appears to me, tell me if I'm wrong, that the
6 amounts that are set forth are based on valuation of
7 options, correct? Both in terms of intrinsic value and, ah,
8 and the value based on the two professors --

9 MS. BERENS: Intellectuals.

10 JUDGE MCGUNNIGLE: Right. I should know that
11 because in a former life I settled at least one case based
12 on that model. I checked yesterday, and the price of the
13 stock, at least as I see it, has gone down about 60 percent
14 since the settlement was reached. What would the value be
15 today? I notice in the, ah, in the, ah, notice that Mr.
16 Vander Weide provided a couple days ago, there was a blank
17 for the current value. And I'm interested in knowing what
18 that is, what are we going to fill in?

19 MS. BERENS: Well, let me, let me back up and tell
20 you what, what I think is key about these settlements. To
21 answer your question, Judge Rosenbaum, the settlements, two
22 of the three, have other components besides just stock
23 options. And I'll detail these, although I'm assuming my
24 counsel will also be in a position, the ones that are
25 representing the settling defendants, but one thing the SLC

1 looked at was the give backs that the company voluntarily
2 received from various people, including these three
3 defendants, two of the three defendants, excuse me, back in
4 2006. So that component is set in stone and that doesn't
5 vary because that transaction occurred back at the, in the
6 fourth quarter of 2006. In addition, as regards Dr.
7 McGuire, 99.4, roughly, million of the settlement that was
8 reached was in --

9 JUDGE ROSENBAUM: Is that percent or dollars?

10 MS. BERENS: That's dollars. 99.4 -- I wish it
11 were percent, given what the market's done, Your Honor, but
12 it's dollars -- was benefits that he was entitled to as the
13 SLC noted, no matter how his departure from the corporation
14 was characterized.

15 JUDGE ROSENBAUM: Okay, this is the stuff, this is
16 the deferred compensation, the other executive items, and
17 things like that, those were cut off.

18 MS. BERENS: Those were returned to the company.

19 JUDGE ROSENBAUM: And then relinquished.

20 MS. BERENS: Correct, Your Honor, so that 99.4
21 million is set in stone. At the time of the settlement,
22 roughly another 420 million, be it Black Scholes or
23 intrinsic, in stock option value would have been returned as
24 of the timing, I think it was December 4th of 2007, that
25 those stock options were valued, and unfortunately the stock

1 was in the 55-dollar range at that point in time. We reran
2 some numbers this week, and I won't, I don't want them set
3 in stone --

4 JUDGE ROSENBAUM: It's 14 dollars 30 cents?

5 MS. BERENS: No, actually the company's writing
6 them a check. No, I shouldn't joke, but, no, umm, roughly
7 about 168 million. So there has been a significant decline
8 in the value of the settlement that Dr. McGuire agreed to.

9 JUDGE ROSENBAUM: A fair number of the options are
10 just plain under water, I presume.

11 MS. BERENS: Yes, there are, there are. There's
12 some, they range in value, my memory is, from like 8 dollars
13 strike price per share up to about 60 dollars per share. So
14 that's one reason there's a significant number of the
15 options that are under water.

16 JUDGE ROSENBAUM: So we've lost 160 million off
17 the settlement?

18 MS. BERENS: Umm, I think even a little more than
19 that.

20 JUDGE ROSENBAUM: More?

21 MS. BERENS: Yeah, yeah.

22 JUDGE ROSENBAUM: Okay.

23 MS. BERENS: Although I suppose in terms of if you
24 want to look at the total assets that an individual had
25 before and after settlement, that boat has also sunk, so

1 that is one thing that the SLC did look at is, is the amount
2 that each individual had as a result of the stock option
3 granting process, and frankly also the amount that was
4 allegedly attributable to the backdating, as people have
5 called it.

6 With Mr. Lubben it's a little different, because
7 over \$20 million of the settlement he reached with the other
8 parties was in options that had already been exercised. So
9 of that amount, that 20 million is, is set in stone, if you
10 will, and then there was -- there was a component, a stock
11 option component that has fluctuated. I think we valued it
12 between 2.2 maybe and 5.5 million. There was a significant
13 difference between intrinsic/Black Scholes, and, umm, we're
14 looking at a lot less for that, you know, we're looking in
15 the range of, it's pretty low. I mean, it's under 500,000
16 right now. Because some of those options are just under
17 water. But, ah, Lubben did give up a significant amount of
18 cash, so that part is protected.

19 And then, ah, with Mr. Spears, that was all
20 options, and for the first two, the dollar amounts, the
21 components of the settlement were all negotiated in advance
22 in the arms' length mediation. So it was determined what
23 benefits, what cash, what tranches of stock options were
24 given up, all that was set out. The figures were reconciled
25 amongst the parties, a market value price was agreed on at

1 the time of the mediation, completion of the mediation
2 process. With Mr. Spears it was a little bit different. In
3 terms of what occurred, the parties reached an agreement
4 that they would go to a binding arbitration to determine
5 what amount Mr. Spears would be returning, and that was,
6 indeed, composed of stock options, and there was a range
7 and, ah, Mr. Phillips, Judge Phillips conducted the binding
8 arbitration, and awarded 7.25 million in --

9 JUDGE ROSENBAUM: Options.

10 MS. BERENS: -- stock options, entirely stock
11 options. Valued as of the date of the settlement. Again,
12 unfortunately, because the market fluctuations, that has
13 gone down substantially. So --

14 JUDGE MCGUNNIGLE: So what is the number that
15 we're going to put in the notice?

16 MS. BERENS: Well, what we would propose to do,
17 Your Honors, is they're complicated calculations, and if
18 indeed preliminary approval is granted and a date is picked
19 on which the notice goes out, then a figure could be
20 calculated. Two days, probably, is what you'd need, market
21 close two days before the shareholder notice goes out, and
22 then the notice would indicate that, you know, this is using
23 X price as of Y date.

24 JUDGE MCGUNNIGLE: And I assume again then that
25 would be a range?

1 MS. BERENS: Both the Black Scholes and the
2 intrinsic.

3 JUDGE MCGUNNIGLE: Um hmm.

4 MS. BERENS: That's correct.

5 JUDGE MCGUNNIGLE: Thank you.

6 MS. BERENS: One final thing I'd like to say, Your
7 Honors. Unfortunately Minnesota law is particularly harsh
8 when it comes to an SLC process, and I'll explain why. It's
9 not in terms of what the reviewing court can do, but in
10 terms of what the SLC process is allowed to do. And in the
11 JNC case, unfortunately affirmed, in my view, by the
12 Minnesota Supreme Court, the SLC process gets one bite of
13 the apple. And if a court decides that either prong of the
14 test is not satisfied, the case goes to trial. I would urge
15 the Court not to undo all this extraordinary work, because I
16 don't think we can go back to the drawing board based on the
17 Minnesota Supreme Court's determination that once the apple
18 has been bitten, you don't get a second bite.

19 JUDGE ROSENBAUM: I thank you.

20 MS. BERENS: Thank you, Your Honors.

21 JUDGE MCGUNNIGLE: Thank you.

22 JUDGE ROSENBAUM: Mr. Cambronne.

23 MR. CAMBRONNE: Good morning, Your Honors.

24 JUDGE ROSENBAUM: You might want to reach over to
25 the side of the lectern -- the other side.

1 MR. CAMBRONNE: Your Honors, my purpose, primary
2 purpose here today was to tell you procedurally how we would
3 encourage the Courts to act. Let me pick up, though, at the
4 outset on a few questions that you asked Barbara Berens and
5 give you our perspective as plaintiffs' counsel in this
6 matter.

7 The Court expressed some concern I think about,
8 well, how do we know what happened? There was some cryptic
9 comments by an SLC and how can we get our arms around that?
10 Well, let me add to that by saying that this day, today, is
11 not the day that you will have a fulsome record before you.
12 What you're going to have at the time of a final hearing is
13 an explanation that really adds a lot of detail --

14 JUDGE ROSENBAUM: I think we understand that today
15 the question is whether the proposed settlement falls within
16 the broad area which may be regarded as a settlement area, a
17 full determination will lie at a later time, but obviously
18 the questions are ones which have been percolating.

19 MR. CAMBRONNE: Right. And what I was going to
20 just say are two things: First of all you can, I know you,
21 the judges are of a mind, and I am here to say publicly and
22 openly that this SLC did a heck of a job. They worked hard,
23 they brought to bear considerable expertise and talent and
24 intelligence, and there are just a lot of hours to this
25 process. And one of the reasons I know that is because this

1 was a very unique resolution that is going to be presented
2 to you because it involved us as plaintiffs' counsel in both
3 the federal and the state case. That is, it was Mr. Carter
4 and myself who initially talked about a mediation a year ago
5 last summer. We asked Judge Layn Phillips to mediate, who
6 happens to be in the courtroom, by the way. We're delighted
7 to have him here.

8 JUDGE ROSENBAUM: Judge Phillips is here?

9 MR. CAMBRONNE: He is.

10 JUDGE ROSENBAUM: Ah. You are welcome.

11 MR. CAMBRONNE: But anyway, after the parties, if
12 you will, in the litigation, underlying litigation said
13 let's try to find a way, we contacted the SLC and said let's
14 make this kind of unusual, let's make it a three-legged
15 stool, if you will, bring together an SLC, advocates on both
16 sides of the question, and work together, the mediation that
17 unfolded over many, many sessions involving very difficult
18 issues, involving a lot of give and take between, for
19 instance, us, plaintiffs' counsel, and the SLC, no, that's
20 not good enough, or, yeah, we think that's the right thing
21 to do, ah. The process, if you will, of bringing together
22 the product that is before you involved not only the
23 imprimatur of a very skilled mediator, Judge Layn Phillips,
24 but it brought together the viewpoints of plaintiffs'
25 counsel, who in this matter are obviously very partisan and

1 very aggressive. So I think you can find some solace in
2 knowing that we have had a very vital role in writing this,
3 and we, too, are going to say today, and next whenever the
4 hearing is, that we think this is a good settlement.

5 JUDGE ROSENBAUM: Let me ask you the same question
6 that I asked your sister.

7 MR. CAMBRONNE: All right.

8 JUDGE ROSENBAUM: Who did the SLC represent in
9 this case?

10 MR. CAMBRONNE: Okay. In, in, in this case -- I'm
11 going to emphasize the word "this" -- this case was brought
12 by primarily institutional shareholders and raised the
13 issue, and said what has happened is wrong, and it is the
14 shareholder case, albeit called derivative, that brought
15 about the result that you have here today both in terms of
16 monetary recovery and governance reforms. So it cannot be,
17 umm, disputed in the least, as far as I'm concerned, that
18 the shareholder constituency, if you will, that stakeholder
19 in the whole process is an important constituency that was
20 represented at the table. So although the benefit of this
21 settlement goes to the corporation, those benefits hopefully
22 flow back to the shareholders. And therefore, you know,
23 Barbara even mentioned some other constituency like
24 employees and the like, but I think when it comes right down
25 to it, we're looking at a corporation that benefits and that

1 benefit flows dramatically and directly to the shareholders.

2 JUDGE ROSENBAUM: Presumably enhanced value to the
3 corporation would enhance the value of the shares, but other
4 than in the metaphysics of that I'm just trying to figure
5 out whose team everybody was playing on.

6 MR. CAMBRONNE: All right. And keep in mind the
7 visual three-legged stool that was at this mediation, ah,
8 two skilled and, make no doubt about it, these two SLC
9 members did a fabulous job, but they're there, they're maybe
10 thinking of things a little differently than we are, we're
11 there, defendants and their skilled counsel had a different
12 view, and it was, it was a long process to get there.

13 But now, to answer another question that the
14 judges, you judges raised here, well, things have changed.
15 Things have changed in terms of stock value. In fact, it's
16 changed so much that if we were to have done our valuation
17 to fill in that blank Tuesday, as opposed to the close of
18 the market today, it's supposed to be a big, bad day today
19 on Wall Street --

20 JUDGE ROSENBAUM: Yesterday was a good one for the
21 corporation according to the New York Times this morning.

22 MR. CAMBRONNE: There you go. But then today with
23 the fallout from the lack of a bailout of the --

24 JUDGE ROSENBAUM: Company doesn't make cars, does
25 it?

1 MR. CAMBRONNE: As far as I know not, Your Honor.
2 As far as I know.

3 JUDGE ROSENBAUM: Thought we'd missed something
4 there.

5 MR. CAMBRONNE: There we are, we are geared up,
6 this is intentional --

7 JUDGE ROSENBAUM: I have my own interest in this.
8 The federal judges' raise is in this settlement too -- not
9 in the settlement, it's in the bailout. All right.

10 MR. CAMBRONNE: All right.

11 JUDGE MCGUNNIGLE: The raise or lack of raise?

12 JUDGE ROSENBAUM: Yeah. The lack of raise.

13 MR. CAMBRONNE: We are a -- we just made the
14 decision, if you were to agree, these two courts, to launch
15 this process, if you will, the smartest thing to do was to
16 do a new valuation as close to the time the notice went out
17 as possible. Judge McGunnigle, I think you asked, well,
18 what is it today, and I say this, I'm going to give you a
19 number that we did on the back of the napkin sometime I
20 think it was in November, and it was circa \$441 million of
21 value of options that, umm --

22 JUDGE ROSENBAUM: Is that lock, stock, and barrel
23 all the parties?

24 MR. CAMBRONNE: Yeah, not only, there's some
25 nuances here, some called settlements, some called other

1 remediation. That's everybody. That's everybody. But now
2 the important thing -- and that was at a point in time
3 during the month of November. This is going to be at a
4 different time in hopefully the month of December. But the
5 important thing to say is, you know, we stood up with great
6 pride about a year ago in front of you, Judge Rosenbaum, and
7 said this is a 900-plus million dollar settlement, and it
8 was at that time. And we said it was the largest, we think,
9 derivative settlement in the history of the nation. I can
10 tell you right now it still is, even with the market drop,
11 so what you're dealing with, of course, is a significant,
12 and we like to think historic, case in terms of recovery in
13 the context of a derivative action and that even ignores the
14 fact that there's been a tremendous amount of, umm, of, ah,
15 governance changes that are significant and substantive
16 which we'll elaborate on another day.

17 But what has happened here is we've come to you
18 with a proposed form of notice, and that form of notice was
19 the subject of vetting and argument and dispute and
20 controversy until this week, and both of you have now
21 received the new form of notice that has been changed
22 slightly, and we've shared it with you, but we have two
23 blanks in there, we have one for whatever day you were going
24 to figure out to value, and that can be done very quickly,
25 we're geared up to do that with the aid and assistance of

1 Barbara Berens, and the other one is a date on which we can
2 reconvene here. As the Courts know, this is not an opt-out
3 case, this is not a claim form case, anything of that sort,
4 so we're going to suggest to you, and I mean we collectively
5 here, that if it's convenient for the Courts, we'd like to
6 have a hearing sometime in February. We are assuming we can
7 have notice go out the month of December, and if we could do
8 that, and that logistically is in the cue here, if you can
9 find time during the month of February where we can
10 reconvene and talk about the issues. For instance, Barbara
11 Berens stood before you today and gave her view of how the
12 lens through which you two should look at this particular
13 case in terms of deciding whether or not to approve. Well,
14 that's all well and good, but I respectfully submit that's
15 not what we have to do today. Ultimately you folks are
16 going to have to deal with that, and grapple with that
17 issue. But I suggest that that day is hopefully in the
18 month of February and we can, umm, we can talk about that
19 further.

20 So we have a notice for you, hopefully it passes
21 muster, by the way, and I know the Courts, having appeared
22 before both of you, you like to see certain things in
23 certain notices. This one, let me highlight what this has.
24 This has a website that every lawyer in this room who thinks
25 something ought to be on that website, and we'll key it up

1 on there, and it will be there. So you can click on
2 anything. The other thing it has is not one but two 1-800
3 numbers for people to, ah, to, ah, ask questions in a
4 convenient, easy way. We have intentionally gone out of our
5 way to make sure that the clerks in the Hennepin County
6 District Court and downstairs here are not going to be
7 burdened by questions, which they'd have to refer out
8 anyway. We've made it as simple as we can in terms of
9 getting more information about this settlement, and
10 hopefully that is consistent with the Courts' desire also,
11 and that's what we tried to do anyway.

12 JUDGE MCGUNNIGLE: Given what we're afraid might
13 happen to the state judicial branch in terms of budget, we
14 may not have anyone to answer the phone anyway.

15 JUDGE ROSENBAUM: Put a machine down there, and
16 you can pick it up, picked up with a tape every afternoon,
17 it'll be fine.

18 MR. CAMBRONNE: There you go.

19 JUDGE ROSENBAUM: You guys are going to have to
20 finance the machine too.

21 MR. CAMBRONNE: Anyway, now that, we're here
22 today, this has been a long and arduous process. We've
23 taken trips to the Minnesota Court of Appeals, we've been in
24 the trenches, we've looked at millions of documents, we
25 collectively in this room say this is a good settlement, and

1 you ought to approve it. We will address the issue and we
2 have some differences of view, frankly, on, to what extent
3 you can look at some things and to what extent you're not
4 supposed to. We'll get that, we'll get that all sorted out
5 on another day, but that's the situation we present with,
6 and hopefully we ask, and you will grant hopefully the, this
7 preliminary approval.

8 JUDGE ROSENBAUM: Thank you, counsel.

9 JUDGE MCGUNNIGLE: Thank you, counsel.

10 MR. VANDER WEIDE: Again, Your Honors, may it
11 please both courts, I'm Vern Vander Weide representing the
12 state derivative plaintiffs.

13 In response to your first question, Judge
14 Rosenbaum, the state statute business corporation statute
15 identifies the constituencies of a corporation's board of
16 directors and they are as follows: They are, of course, the
17 shareholders, which is a comfort to investors, also
18 creditors, employees, vendors, customers, and the community
19 or communities in which those, that corporation operates.
20 That's a product of the heyday of the corporate takeover era
21 where states got concerned that companies the likes of
22 Dayton's was going to be taken over by some outfit in the
23 east, that far away place from which many lawyers are here
24 today, and so they erected these anti-takeover provisions,
25 one of which was to broaden the constituencies that

1 directors had to be mindful of. And if you read, as I know
2 you have, the SLC's report, the SLC touches on these things,
3 and all of this, of course, is bound up in this rule called
4 the Business Judgment Rule, which only directors can,
5 according to the Minnesota Supreme Court, fully, properly,
6 efficiently, knowingly, wisely administer.

7 JUDGE ROSENBAUM: They were zealous to tell me we
8 couldn't.

9 MR. VANDER WEIDE: Excuse me, Your Honor?

10 JUDGE ROSENBAUM: They were zealous to tell us we
11 couldn't.

12 MR. VANDER WEIDE: It seems that's what they said.

13 JUDGE ROSENBAUM: Yes, so I saw that.

14 MR. VANDER WEIDE: That's the -- and so when the
15 SLC here, which of course has stepped in the shoes of the
16 directors, not only for purposes of this particular lawsuit,
17 but it had to take into account all of these other factors,
18 and it recited what it did in that regard in terms of
19 corporate interests, so it's not just a matter whether the
20 litigation has merit, whether the company was damaged, but
21 also whether in light of all of that, or despite all of
22 that, the litigation should either go forward, be resolved,
23 dismissed, what have you, and that of course brings us here.

24 So, and I would reiterate, ah, that we're only
25 here asking the Court to preliminarily approve this deal.

1 It's a very substantial deal. I'm not going to recite all
2 the magnitudes and the superfluous adjectives. However, if
3 we look at it in comparison to maybe a couple of yardsticks
4 that are relevant, because in absolute terms it is large.
5 It is still large even in its reduced value. But also if
6 you compare it against, ah, the restated earnings that
7 UnitedHealth had to undertake as a result of this activity,
8 which if memory serves me was in the neighborhood of 1.2 to
9 1.3 billion dollars, this number at the time of the
10 settlement a year ago, \$930 million is pretty close to that.

11 Another possible yardstick would be the class
12 action settlement, which I understood the Court is going to
13 be entertaining next week. Again, this settlement in its
14 original numbers, ah, was very close to that, and I can tell
15 you that these were factors that were in the minds of a
16 negotiating -- all of us who participated in these
17 negotiations, to come up with a, a number that has real life
18 meaning in terms of external yardsticks. Relevant to the
19 company.

20 So for those two reasons, ah, I would submit, Your
21 Honors, that there is plenty here in terms of these factors
22 for the Courts to grant preliminary approval. If there are
23 some further things that need to be done, we will have some
24 time to do it. But for now, this is, ah, this is
25 sufficient.

1 And with that, I will not reiterate what's in our
2 papers. If the Courts have any questions I'd be happy to
3 entertain them, otherwise I've said my piece.

4 JUDGE MCGUNNIGLE: Thanks, Mr. Vander Weide.

5 MR. CARTER: Good morning, Your Honors.

6 JUDGE ROSENBAUM: Mr. Carter.

7 JUDGE MCGUNNIGLE: Mr. Carter.

8 MR. CARTER: I want to start first by thanking
9 both Courts for the time today and the time the Courts have
10 devoted to this matter throughout its duration. I can tell
11 you that your staff at various times has been barraged by
12 phone calls from lawyers, John and Michelle, Judge
13 McGunnigle, from your chambers, and Heather, Judge
14 Rosenbaum, from your chambers, they're always very
15 responsive, very professional, and frankly, umm, I think
16 allowed this case to stay on track, because lawyers were
17 making requests to either have hearings or a visit with the
18 Courts in chambers. So we do appreciate that.

19 JUDGE MCGUNNIGLE: That's very timely, with
20 respect to my staff, because I'm about to do Michelle's
21 annual review.

22 MR. CARTER: Please make sure that's in the file.

23 JUDGE ROSENBAUM: It's also appreciated. Umm, it
24 looks like we're driving the bus, but there's a lot of
25 things that go on behind in order to get us around here.

1 And on behalf of my staff, but personally I thank you for
2 recognizing some really good people.

3 JUDGE MCGUNNIGLE: It happens all too seldom that
4 lawyers acknowledge that.

5 MR. CARTER: I realize we were a burden, and we do
6 appreciate the Courts' time.

7 We join in the SLC's motion. I'm going to focus a
8 little bit on the process question that was asked Barbara
9 Berens. Umm, I think when you look at the affidavits of
10 Justice Blatz and Justice Stringer, it truly is remarkable,
11 because, umm, they rolled up their sleeves, they clearly
12 looked at millions of documents. They interviewed dozens of
13 people. They hired experts, not just lawyers, but also
14 accountants, and an expert in corporate governance. And
15 they did this over a lengthy period of time. Over one year
16 of investigation. And they took the time also to
17 deliberate. That is also set forth in the report. And I've
18 been involved in, umm, a handful of SLC processes before,
19 and I can tell this, the Court, that this was truly
20 extraordinary. And I think if the Court is, umm, concerned
21 about process and the black box, I actually believe that
22 there's a great amount of detail in those affidavits and in
23 the SLC report, umm, that will give the Courts comfort that
24 this was a process that was thorough, it was complete, it
25 was adequate, and it was conducted in good faith. Indeed,

1 on their list of interviewees, which was provided as an
2 attachment to the report, they interviewed everybody from
3 the board of directors to the CEO to administrative
4 assistants. It was a deep and broad investigation. And
5 that was appropriate, because the board, when it created the
6 SLC, gave the SLC complete power to determine the claims.
7 And as a result, the justices did what one would hope they
8 would do in a situation where they had those decisions to
9 make. I think the results speak for themselves. I actually
10 believe that this SLC will be looked at in the future as a
11 model for SLCs.

12 One of the things that I have a slightly different
13 view on than my colleague, Barbara Berens, is she made
14 reference to the dollar settlement and whether or not the
15 dollar settlement would somehow bleed into the question of
16 good faith and independence. And I believe the Minnesota
17 Supreme Court opinion is very clear, that the inquiry is
18 limited to good faith and independence. And if we had had a
19 recommendation from an SLC that said in our judgment, in
20 exercising the business judgment, we don't think it's in the
21 best interests of the company to pursue a lawsuit. That
22 should also be given deference as long as the SLC was
23 independent, and as long as the SLC conducted its
24 investigation in good faith. And in many instances, because
25 there's a risk benefit of any time a corporation has to

1 decide whether to bring a lawsuit, there may be many risks
2 in pursuing a lawsuit, including, umm, indemnification
3 requirements, including how much money is really out there,
4 including just the distraction and pain of litigation. Umm,
5 that is often the case, and indeed in many SLC situations,
6 the SLC does recommend the claims not be brought for some of
7 those same reasons. I don't think the value of the
8 settlement is frankly relevant to the Courts' decision at
9 this point. I will say it's historic. The number of
10 options, despite the vagaries of the market, does not
11 change, the number of options that are relinquished because,
12 Judge Rosenbaum, you asked specifically about the
13 shareholders, umm, there's no question that one of the
14 beneficiaries of options being returned or relinquished will
15 be the shareholders, because what happens is that that is an
16 anti-dilutive of that.

17 JUDGE ROSENBAUM: Right.

18 MR. CARTER: In fact I think they are in many ways
19 the primary sharehold -- or the primary beneficiaries.
20 There is the corporation benefits, but the shareholders I
21 think get an extra bang for the buck.

22 We ask that the Court preliminarily approve this
23 settlement.

24 The one thing I do want to alert the Court to is
25 that we do intend to dispute the attorneys' fees at the

1 appropriate time, which we believe to be at the final
2 settlement approval hearing, because there is a number of --
3 fee number that the plaintiffs have put into the notice --

4 JUDGE MCGUNNIGLE: It's a not-to-exceed number.

5 MR. CARTER: It's a not-to-exceed number. We've
6 not seen their fee petition to date, but we believe that
7 that number is outrageous.

8 JUDGE ROSENBAUM: All right.

9 MR. CARTER: Thank you.

10 JUDGE ROSENBAUM: Thank you, counsel. Anyone
11 else?

12 JUDGE MCGUNNIGLE: Anyone else?

13 JUDGE ROSENBAUM: Have anything further?

14 JUDGE MCGUNNIGLE: No.

15 JUDGE ROSENBAUM: I thank you. For my sake, and I
16 appreciate your appearance. Judge McGunnigle and I, I
17 think, are of a mind to take the matter under advisement.

18 JUDGE MCGUNNIGLE: Yes. That's what I'm prepared
19 to do. I also want to express my appreciation for the way
20 this motion was briefed and argued. I would have expected
21 nothing less from the lawyers, all of whom I know, and many
22 of whom I've had cases against, and so I appreciate, I
23 always appreciate competence and professionalism in the
24 briefing and arguments I have.

25 JUDGE ROSENBAUM: One of the -- it's been a tough

1 case, but it's been really high quality work. Great fun to
2 work with. Thank you very much. We'll be in recess.

3 MR. BRODSKY: Your Honor, there is another matter
4 that is just on the federal docket.

5 JUDGE ROSENBAUM: Yes, that is a question of a
6 release of a, ah, an injunction? I seem to recall it.

7 JUDGE MCGUNNIGLE: I'll take my leave.

8 JUDGE ROSENBAUM: I think we'll step off. You
9 guys can realign yourselves. And I'll come back in a couple
10 seconds.

11 MR. BRODSKY: Thank you, Your Honor.

12 (Recess.)

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CERTIFICATE

I, Dawn Marie Higby Hansen, do certify that the above and foregoing transcript is a true, correct, and accurate transcription of my stenographic notes taken in the above proceedings.

s/ Dawn M. H. Hansen
Official Court Reporter